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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 485,

JAMES TARRANCE, WILL SMITH, AMOS CLARK, JUDSON MOORE, CHARLES ROBINSON, DAVE POWELL, MARSHAL BOYD and W. C. GREEN, alias NEWT GREEN, PLAINTIFFS IN ERROR,

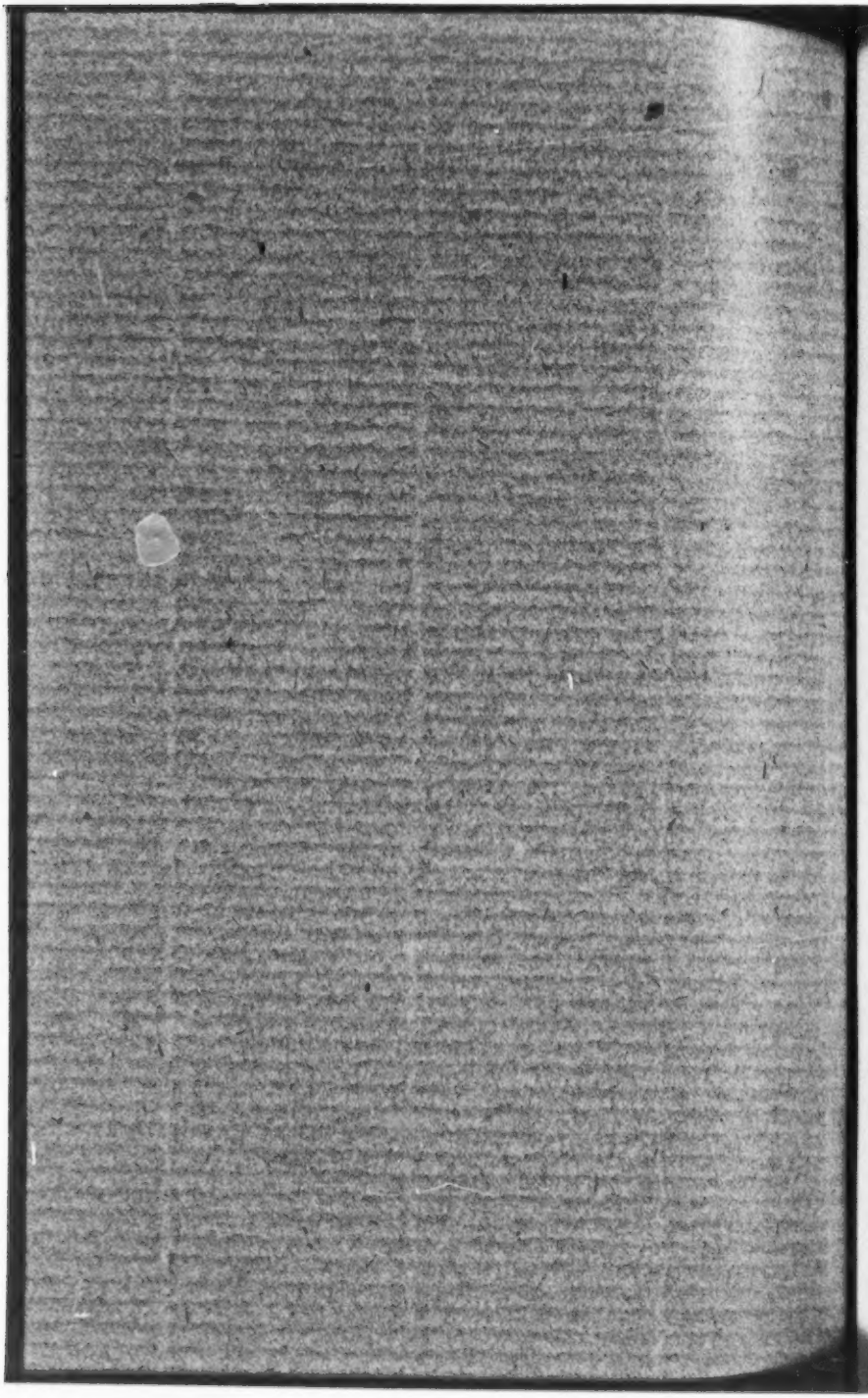
vs.

THE STATE OF FLORIDA, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

ISAAC L. PURCELL,
Attorney for Plaintiffs in Error.

W. H. Campbell, Job Printer, Pensacola, Fla.



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STATEMENT.

At the Fall Term, A. D. 1900 of the Circuit Court, Escambia County, Florida, Plaintiffs in error were indicted for the murder of one W. B. Moore, a white man, and convicted at the same term of murder in the third degree, and sentenced to fifteen years in state prison; and from the sentence imposed sued out writ of error to the Supreme Court, State of Florida, being the highest state court having jurisdiction over the cause; which said court affirmed the judgments of the court below. From the decision of the State Supreme Court sued out writ of error to this Honorable Court.

The question passed on by the state court was the claim of plaintiffs in error that all colored men, or men of the Negro race, were discriminated against in the selection of names for jury duty in Escambia County by the county commissioners of said county, on account of race, color and previous condition of servitude, and that this discrimination not only by the county commissioners, but by the sheriff of said county, had refused and failed to select or summon any colored men either on the grand jury which found and presented the indictment against plaintiffs in error, as also the petit jury which was to try their cause.

Inasmuch as they are colored men, or negroes, this discrimination against their race, simply on account of their race and color, was a discrimination against plaintiffs, and denial to them of the equal protection of the law as guaranteed to them by the 14th amendment to the Constitution of the United States; plaintiffs being members of the Negro race.

At the trial in the Circuit Court, and after indictment was presented and filed, but before pleading thereto, defendants in the court below, filed a motion to quash the venire of grand jurors, also the 8 remaining petit jurors. (See page 26 of printed record.)

The State filed its motion to strike defendants' motion (See motion page 28 of printed record); which said motion to strike coming on to be heard, was argued by counsel for the State and the defendants, and the court made an order, sustaining the State's motion to strike; to which ruling the defendants then and there objected and assign the same as error

Thereupon on December 6th, defendants filed their motion to quash the indictment; (See motion page 27 of printed record.) To this motion no objections were interposed by the State; the allegations were neither denied or traversed but were overruled by the court; to which ruling the defendants excepted, and was assigned as error in the State Supreme Court. On 7th of December, 1900, plaintiffs in error, defendants, in the court below were arraigned, pleaded not guilty and case set for trial December 13th. A special venire issued for seventy-five jurors to be summoned by the sheriff from the body of the county, to try the case, returnable December 13th.

On December 13th special venire called and defendants interposed a challenge to the array.(see challenge page 31 of printed record.) Whereupon the court did consider the challenge and denied the same; to which defendants excepted and assigned same as error. The State did not join issue on challenge and the truth of the allegations was neither denied

or traversed.

Before the trial jury was empanelled, three other special venires were returned by the sheriff, defendants entering challenget to the array upon return of each venire. (see challenges pp. printed record.) Same were neither denied nor traversed by the State; each of which was over-ruled by the court, and ruling excepted to by defendants. Trial panel having been completed, trial commenced; the case being given to the jury, which returned a verdict of "murder in the third degree."

Defendants then moved for new trial, which motion was over-ruled, to which defendants excepted. The grounds of this motion were that the court erred in striking defendants' motion to quash the venire and panels of gaand and petit jurors, in striking defendant's motion to quash the indictment, in refusing to grant the defendants' challenges to the several special venires of petit jurors, and that the verdict was contrary to the law, the evidence and the charge of the court.

The errors assigned and argued were:

1. The court erred in striking defendants' motion to quash the venire and panels of grand and petit jurors.
2. The court erred in refusing defendants' motion to quash the indictment.
3. The refusal of the court to grant defendants' several challenges to the array of the several special venires.
4. The refusal of the court to grant defendants' motion for a new trial.

This cause came on to be herd before the Supreme Court of the State of Florida, June term thereof, 1901, was orally argued and submitted on brief, the only questions raised and discussed being the errors as above stated; the Supreme Court denying contentions of plaintiffs in error and affirming the decision of the Circuit Court.

The opinion of the Supreme Court of the State of Florida will be found in the printed record pp. We republish this opinion and make it a part of this brief under the head of "appendix A."

From the judgment sustaining the trial court, the plaintiffs in error appealed to this court, a writ of error having been allowed by the Chief Justice of the Supreme Court of Florida.

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Escambia County, Florida erred in striking defendants' motion to quash the petit and Grand Jurors on the grounds set out in and by their said motion.

2. The Circuit Court of Escambia County, Florida erred in rejusing defendants' motion to quash indictment therein, on the grounds set forth in and by their said motion.

3. The Circuit Court of Escambia County, Florida, erred in refusing defendants' several challenges to the array of the several special venires on the grounds therein set forth.

4. The Circuit Court of Escambia County, Florida, erred in refusing defendants' motion for a new trial on the grounds as set up in and by said motion.

5. The Supreme Court of the State of Florida erred in affirming the findings of the Circuit Court of Escambia County Florida.

ARGUMENT.

We do not contend that colored men are discriminated against by any law of this state in the selection of names for jury duty, nor do we contend that a Negro being tried for a criminal offense, is entitled to a jury composed wholly or in part of members of his race; but do claim that when a Negro is tried for a criminal offense, he is entitled to a jury selected without any discrimination against his race on account of race, color or previous condition of servitude; and when this is not the case, he is denied the equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States.

The Supreme Court of Florida in its opinion in the case at bar says: "It was not claimed upon oral argument nor is it claimed in the briefs, that the laws of this state prescribing the qualifications of jurors and regulating the manner of selecting, summoning and empanelling them, discriminate against any person or class of persons on account of race, color or previous condition of servitude. (see opinion page of printed record.) It is true that there is no discrimination created by law, but it must be admitted by all fair minded men that in the State of Florida in the selection of jurors to serve in our courts, the county commissioners and sheriffs, whose duty it is made by law to select names for jury duty, discriminate against all Negroes and refuse and fail to select any for jury duty simply on account of their race and color, and as Mr. Justice Matthews, in delivering the opinion of the the Court in Yick vs Hopkins, 118 U, S. 256, as though hav-

ing in view, as he did, that such invasion might depend upon the whim or caprice of some man or set of men, as in this state, forcibly said: "The very idea that one man may be compelled to hold his life or means of living or any material right to the enjoyment of life at the mere will of another, seems to intollerable in any country where freedom prevails as being the essence of slavery itself." And again, in the same opinion, it is said: "Though the law itself be fair on its face and impartial in appearance, yet if it is administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This principle has been santioned by this Court in Hendervs. Mayor of New York, 92 U. S. 259; Chy Lung vs. Freeman, 92 U S. 275; ex-par-e Virginia, 100 U. S. 329.

The 14th amendment, as stated by Mr. Justice Matthews in Yick Wo vs Hopkins, 118 U. S. 355, 357, quoting from the opinion of this Court in Barber vs. Connelly, 113 U. S. 27: "undoubtedly intended that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediments should be interposed to the pursuits of any one, except as applies to any one under like circumstances; that no greater burdens should be loaded upon one than are loaded upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences," etc.

These authofities go to show conclusively that where the discrimination is made by officers of the law, the equal protection of the law is equally denied.

Now let us discuss the case as presented by the record. Our contention briefly stated is this:

1. Defendants' motion in the trial court to quash the venire of grand and petit jurors ought to have been granted.

2. Defendants' motion to quash the indictment ought to have been granted and the indictment quashed.

3. Defendants' challenges to the several special venires

of petit jurors ought to have been granted.

4. The allegations of the motions and challenges having been duly made and not having been either denied or traversed by the state, there was no necessity on the part of defendants to introduce evidence to prove allegations.

First; That defendants' motion to quash the venire of grand and petit juries ought to have been granted.

The State Supreme Court, in its opinion, claims that at the time of making defendants motion to quash the panel of petit jurors, defendants' case had not been set, hence they had no right to move at that state of the proceedings. We contend that it was the proper time. Defendants' case was called for trial, if they had entered their plea to the indictment, trial, under our practice, would have commenced; therefore the motion was timely and the court should not have stricken same, but ought to have considered it. We state here and are borne out by the rulings of the trial court and the tenor of the motion by the State's Attorney that the court below considered all motions and challenges as being impertinent, and that even if the allegations were true, the court would not be justified in quashing the indictment and granting the several challenges to the array of the several special venires. To defendants' motion to quash (see motion page of printed record) the state filed the following motion to strike defendants' motion in the following words:

"And now comes the State, by its attorney, and moves the court to strike the motion to quash the venire herein and for cause, says:

1. Said motion is impertinent.
2. Said motion submits nothing to the court for consideration or determination.
3. Because said motion is not such a motion as this court can consider in these proceedings.
4. Because said motion sets up no state of facts which if true would justify the quashing of the venire."

Which said motion was granted and defendants' motion stricken.

We contend, defendants' motion ought to have been considered.

Let us briefly discuss the motion to strike, as also defendants' motion to quash.

First; Was defendants' motion pertinent.

We contend it was and raised the question of discrimination against Negroes in the selection of jurors and, in as much as defendants are Negroes, they were discriminated against,

thus denied the equal protection of the law as guaranteed by 14 Amendment to Constitution of the United States.

Second; The motion submits for the consideration of the court these facts as set up. and the court ought to have considered and determined whether or not the allegations were true.

Third; We contend the motion was a proper one, and the question raised could be either by plea in abatement or motion to quash See Ellis vs State 25 Fla. 703, also Potsdamer vs state 28 Fla. 895.

This proposition we will discuss more fully further on.

Fourth; The state of facts as set up by defendants' motion, if true would justify the quashing of the venire. Carter vs. Texas 177 U. S. 442.

You will perceive contention of the state was, all through the trial, that the facts as set out in and by defendants' motion, even if true, would not justify the quashing of the indictment, however, this honorable Court has repeatedly said, when all colored men are discriminated against in selecting jurors for the trial ofa Negro on a criminal charge, simply on account of color &c., the equal protection of the Law is denied. see Carter vs Texas, 177 U. S. 442.

Second. We contend it was error in refusing defandants motion to quash the indictment on the grounds as set out in and by said motion. see page of printed record.

The state neither denied nor traversed the motion, is sworn to and, inasmuch as, the allegations therein set forth are not denied, they are admitted to be true, and if true, the motion ought to have been granted and the indictment quashed, since, defendants would be denied the equal protection of the law as contemplated by the 14 Amendment Constitution of the United State. See 14 Amendment Sec. I,, also Carter vs Texas as 177 U. S. 442 and authorities.

It is contended that in the trial court defendants neither introduced nor offered to introduce any evidence to prove the allegation of their motion, we contend that in this case, the state did not join issue, did not traverse or deny the truthfulness of the allegations. hence defendants were not called on to prove facts and allegations not denied.

In Carter vs Texas 177 U. S. 442 the Court say.

"The motion to quash on such a ground being based on allegations, if controverted by the attorney of the state, must be supported by evidence on the part of defendant," citing Smith vs Mississippi 162 U. S. 592 et seq. Williams vs Mississippi, 170 U. S. 213. approvingly, hence, we conclude from the language as used by the Court in the Carter case, that

when the allegations, are not controverted by the state, they are admitted as true, and in such case, the defendant is not called upon to prove allegations which, he asserts to be true and are not denied by the state's attorney, hence we contend that in the case at bar, the allegations made by defendant, not being denied, or traversed by the state, were accepted as true.

As Mr. Justice Harlan in delivering the opinion of the Court in Neal vs. Delaware, 103 U. S. 370, says: "But passing by the ruling of the court below as insufficient, in itself, to authorize a reversal of the judgment, we are of opinion that the motion to quash, sustained by the affidavit of the accused, which appears to have been filed in support of the motion, without objection to its competency as evidence, and was uncontradicted by counter affidavits or even formal denial of the grounds assigned, should have been sustained. If, under the practice which obtains in the courts of the state, the affidavit of the prisoner could not, if objected to be used as evidence in support of a motion to quash, the state could waive that object on, either expressly or by not making it at the proper time. No such objection appears to have been made by its Attorney General at the trial."

In the case at bar, we contend that inasmuch as the state's attorney did not object to the sufficiency of motion and the affidavits of the defendants attached thereto at the trial of the cause, all objections thereto were waived by the state; because, as said supra: "the state could waive that objection either expressly or by not making it at the proper time." And in this case the state did not even make a formal denial of the allegations.

The motion asserted there were equally as many Negroes in Escambia County qualified for jury duty as white men; the county commissioners knew this to be true, and yet knowingly failed and refused to select any for jury duty because of their race and color; there being no denial to the facts, we most respectfully contend, presented a prima facie case of denial by the officers charged with the selection of jurors, of that equality of protection which has been secured by the 14th amendment to the Constitution; hence the motion should have been granted and the indictment quashed.

The Supreme Court of Florida, in passing on the motion to quash, says: "We are of the opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground." Citing Woodward vs. State, 35 Florida, 508; Kitrol vs. State, 9 Florida 9; Gladden vs. State,

Tersin vs. State, 37 Florida, 396. (See page of printed record.) We contend that in Florida the question can be properly raised either by motion to quash or by plea in abatement of the indictment.

Now let us review the decisions of the Florida Supreme Court on the question. In Ellis vs. the State of Florida, 25 Florida, 702, this is a case in which the contention that some of the grand jurors who found the indictment were not at the time of finding said indictment, registered voters of Marion County and were not qualified to sit on the grand jury, etc. This is a matter clearly not appearant on the face of the indictment, yet at page 711 the court says: "This objection comes too late when first made in the motion for new trial, as objections that relate to the summoning, qualifications and organization of the grand jury must be taken by motion or plea in abatement before pleading to the indictment;" citing approvingly Gladden vs State 13 Fla. 623; Buroughs vs State 17 Fla 643; Potsdamar vs State, 17 Fla., 895.

In Potsdamar vs State, the court says, "Objection to the manner of summoning, empanelling and qualifications of grand jurors must be taken by plea in abatement or motion to quash before pleading to the indictment.

The only decision of our Supreme Court I have been able to find sustaining the proposition, that the only way to reach the objection to the empanelling of the grand jury is by plea, is reported in 37 Fla. McTervin vs State at page 403, the court says, "If there was any such irregularity in the drawing or empannelling of the grand jury that found indictment as would render such indictment void or illegal, the proper way to make it appear was by plea in abatement, instead of by motion to quash."

The facts in this case are the same as in the cases cited above, and the court clearly reverses its former decisions, on the same question; with this showing, if we are to consider former decision of the Florida Supreme Court, as being of any value, bearing on the question, we contend that the question raised by defendants as to the grand jury could be properly raised either by motion to quash or by plea in abatement.

Third. We contend that the court erred in refusing or denying defendants several challenges to the array of petit jurors. See challenges at pages of printed record.

The supreme court of Florida in its opinion, at page of printed record says, "The objections to the special venires for petit jurors were properly taken by challenges to the array. No evidence was produced or offered to prove the facts as-

sented in these challenges, and the written challenges were not even verified by defendants affidavits as was the motion to quash. The court ruled correctly in denying these challenges, because there was no evidence to sustain them."

If the challenges to the array of the several special venires of petit jurors were proper, and of this there is no contention, then we contend, inasmuch as, the challenges were not denied or traversed by the state, the allegations were taken and accepted as true, therefore the challenges ought to have been sustained and the special venires quashed.

But, says the supreme court of Florida, the challenges were not sworn to; that is true but, at the common law no affidavit is required but the challenge must be in writing.

"At common law every challenge either to the array or to the polls was required to be propounded in such a way that it might be put upon the record, and that too, with great particularity." Thompson and Merriam on Juries, pages 246 sec. 231. We contend, that according to the weight of authority, it is not necessary for a challenge to be sworn to or even, perhaps, reduced to writing; however, if there were any defects in the challenges, the state by its attorney should have taken advantage of such in the trial court, not having done so, all such objections were waived, and came too late when first brought in the appellate court.

To the challenges filed by defendants, the state did not demur ,which would have brought into consideration the legality of the matter of challenge, or counter plead, by setting up some new matter consistent with the matter of challenge, to vacate or anul it as ground of challenge, or deny what was alleged as matter of challenge. None of this was done; not even a formal denial of the matter set up in challenge was made. The several special venires of jurors were present before the court, and there being no Negroes on any of said special panels, yet the court considered the challengas, considered them to be sufficient in law, and denied the same. We contend thot since defendants had repeatedly called the attention of the trial court to the fact that in the selection of jurors, all Negroes had been discriminated against by the officers of the law in selecting names for jury duty, simply because of their color, first by motion to quash the venires of grand and petit jurors, filed and considered December 6th, 1900, Second by motion to quash indictment on same date. Then on December 13th, 1900 by challenge to the array of the regula venire of jurors, then again on December 13th by challenge to the array of the special venire of 75 petit jurors selected by the sheriff for the trial of defendants, which was

denied. And again on the same day filed their challenge to the array of special venire of 8, which challenge was denied; then again on the same day defendants challenged the special venire of 12 men selected by the sheriff to try defendants' case, which said challenge was denied. On December 14th the trial panel not having been completed, a special venire of 6 was returned, defendants again challenged the array of the special venire, which said challenge was denied. We call the Court's special attention to the motions and challenges made by defendants from which you will see repeatedly called the attention of the court to this discrimination, alleging in their said motion, that the county commissioners had discriminated against all Negroes in the selection of names for jury duty, that none had been selected either on grand or petit juries, and this discrimination purely on account of race and color. These allegations were not denied, in fact, the state could not deny the statement that no Negroes were on the grand jury which found the indictment and the petit jurors summoned to try the defendants, because the panels were in the view of the court, and there could be no doubt of the fact that no Negroes had been selected on either of said panels. This fact is admitted, it could not be otherwise, then the only remaining question is, why were Negroes discriminated against by the commissioners? We say on account of their race and color; the state does not deny the fact, hence we contend they admit Negroes were excluded simply on account of their race and color.

We again most respectfully call your attention to the fact that during the empanelling of the jury, there were four special venires returned by the sheriff each of which defendants challenged the array, because the sheriff had discriminated against all Negroes. (See challenges pp. of of printed record.)

Page of printed record shows that on the 13th day of December 1900, defendants filed motion to quash the array of the special venire of seventy-five men because the sheriff in selecting jurors to try defendants, discriminated against all Negroes simply on account of their race and color. On the same day there was another special venire of eight selected by the sheriff, of which no Negroes had been selected; and again on the same day a special venire of twelve, no Negroes being selected, challenge again to the array, and again a special venire of twelve no Negroes selected. Again on the 14th a special venire of six and no Negroes selected; in the four special venires selected by the sheriff, not a single Negro selected, and this after having called the attention of the

court that the sheriff was discriminating against Negroes in the selection of persons for jury duty, and simply on account of their race, color and previous condition of servitude; and the fact that the charges were not even formally denied by the state, and the fact that all Negroes were discriminated against could not be denied. Since none were selected we contend is prima facie evidence of discrimination on on account of race and color, and if not true, should have been denied by the state; because if it was incumbent on defendants to prove the motive or reason why the sheriff failed to select any Negroes, other than by his actions, would be to require the state to prove intent in a criminal cause by evidence other than by the actions of the party accused. We can only prove motive or reason of the sheriff in not selecting Negroes by the fact that he did refuse and fail to select any Negroes, and when charged with this discrimination, makes no explanation, but on the contrary continues to discriminate, and in the case at bar selects 4 special venires consisting of 101 men, and not selecting a single Negro in the face of the showing made by the defendants, we contend make a prima facie case of denial by the officers charged with the selection of grand and petit jurors, of that equality which has been secured by the Constitution and laws of the United States. And as is said by Mr. Justice Harlan in Neal vs. Delaware, 103 U. S., in rendering the decision of this honorable Court: "The action of these officers is to be deemed the act of the state; and the refusal of the state court to redress the wrong by them committed, was a denial of a right secured to the prisoners by the Constitution and laws of the United States. Speaking by Mr. Justice Strong in Ex-parte Virginia, we said and now repeat: A state acts by its legislative, its executive or its judicial authorities. It can in no other way. The constitutional provision, therefore, must mean that no agency of the state or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's authority, his act is that of the state. This must be or the constitutional prohibition has no meaning,' Ex-parte Virginia, 100 U. S. 347."

In the case at bar we contend that inasmuch as the state acts through its officers, the record shows that these officers did discriminate against all Negroes, simply on account of

their race and color, therefore defendants, in the court below, were denied the equal protection of the law as contemplated by Sec. 1, 14th Amendment to the Constitution of the United States

The challenges should have been granted and the venires quashed; and we insist that the refusal of the trial court to grant defendants' challenges was clearly a denial to the defendants of the equal protection of the laws and the finding of the state court should be reversed.

But the Supreme Court of Florida say the defendants in the court below did not sufficiently call the attention of the court to the matters complained of by them, that they offered no evidence to support their contention. This contention has been fully discussed in the preceeding pages, however, we contend: "the question weather a right or privilege claimed under the Constitution or laws of the United States was sufficiently pleaded and brought to the notice of a state court, is itself a Federal quesiion, in the decision of which this court on writ of error, is not concluded by the view taken by the highest court." Neal vs. Delaware, 103 U. S. 370; Mitchell vs. Clark, 110 U. S. 633; Boyd vs. Nebraska, ex rel. Teayer 143 U. S. 135; Carter vs. Texas, 177 U. S.

And we most respectfully submit, your Honors, that in the case at bar, the attention of the trial court was sufficiently called to the rights and privileges claimed by defendants under the Constitution of the United States; their contentions should have been sustained, and the refusal of the State Court to sustain same, was a denial to defendants of the equal protection of the laws, We insist that the action of the state courts in denying the defendants the equal protection of the laws, is a violation of their constitutional rights, a denial to them of a fair and impartial trial by a fair and impartial jury of their country, selected and empanelled without any discrimination against them on account of their race, color or previous condition of servitude, and tends to corrupt the jury system and to made despots and masters of one class of our citizens, serfs and slaves of the other.

ERRATA.

Last paragraph on page 7 should read: "The motion to quash on such grounds being based on allegations of facts not appearing in the record, these allegations, if controverted by the attorney, for the state, must be supported by evidence on the part of the defendant."